

17-1727

No.

Supreme Court, U.S.

FILED

APR 18 1988

JOSEPH F. SPANGLER JR.
CLERK

IN THE

of the United States

BER TERM, 1987

BRIDGEMAN MAIN & CO.,

Petitioner,

—v.—

THOMAS TEW,
TECHNICAL GROUP, INC., *et al.*,

Respondent.

**A WRIT OF CERTIORARI
UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT**

PHILIP A. LACOVARA

Counsel of Record

HUGHES HUBBARD & REED

1201 Pennsylvania Avenue, N.W.

Washington, D.C. 20004

(202) 626-6200

VICTOR M. EARLE, III

CAHILL GORDON & REINDEL

80 Pine Street

New York, New York 10005

(212) 701-3000

QUESTIONS

1. Is the independent action to
lently obtained judgment under
60(b) of the *Federal Rules of*
stances of "extrinsic fraud" or

2. Is there no power under t
60(b) to set aside a judgment for
the trial attorney had suborned
which was instrumental in winn

* Respondent is the Receiver
owned subsidiaries, ESM Group
Inc., ESM Securities, Inc. and

a fraudu-
se of Rule
ted to in-
urt”?

se of Rule
urt” where
d evidence

and its wholly-
nent Securities,
p, Inc.

TABLE OF CONTENTS

OPINIONS BELOW	
JURISDICTION	
RULE INVOLVED	
STATEMENT OF THE CASE	
REASONS FOR GRANTING THE WRIT	
I. This Latest Circuit Conflict Over An Historically Divisive Issue Requires Resolution By The Court	
II. The Harsh Limitation Imposed by the Court on Appeals on the Third Saving Clause of Rule 60(b) Conflicts with a Leading Decision of the Court	
CONCLUSION	
APPENDIX A	
APPENDIX B	
APPENDIX C	
APPENDIX D	

Law Reviews

Comment, <i>Rule 60(b): Survey and Proposal for General Reform</i> , 60 Calif. L. Rev. 531 (1972)	9, 12
Note, <i>Attacking Fraudulently Obtained Judgments in the Federal Courts</i> , 48 Iowa L. Rev. 398 (1963).....	11
Note, <i>Federal Rule 60(b): Relief from Civil Judgments</i> , 61 Yale L. J. 76 (1952)	8

Rules

ABA Model Code of Professional Responsibility	
Canon 7	14
EC 7-25	14
EC 7-26	14
EC 7-27	14
EC 7-28	14
DR 7-102	14, 14n
ABA Model Rules of Professional Conduct	
Rule 3.3	15n
Rule 3.4	15n
Federal Rules of Civil Procedure	
Rule 12(b)(6)	4
Rule 60	<i>passim</i>
Florida Rule of Appellate Procedure 9.030(a)	3

Statute

Judicial Code 28 U.S.C. § 1254(1) (1982)	2
------------------------------------------------	---

Treatises

7 J. Moon
1987).

W. Pross
1984).

11 C. W
dure (1

Other Au

Advisory
F.R.D.

Restatem

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

No. _____

PEAT MARWICK MAIN & CO.,

Petitioner,

—v.—

THOMAS TEW,
RECEIVER FOR ESM GROUP, INC., *et al.*,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Peat Marwick Main & Co. (formerly Peat, Marwick, Mitchell & Co.) respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-8a) is reported at 835 F.2d 270. The opinion and order of the United States District Court for the Southern District of Florida (Gonzalez) (App. B, *infra*, 9a-18a) is not reported.

The judgment of the court, 7, 1988, and a petition for writ of habeas corpus, 10, 1988 (App. C, *infra*), invoked under 28 U.S.C.

RU

Rule 60, *Federal Rules of Civil Procedure*,
 Judgment or Order

(b) **Mistakes; Inadvertence; Newly Discovered Evidence; Fraud**
 As are just, the court may set aside a judgment or order representative from a final judgment for the following reasons: (1) mistake or neglect; (2) newly discovered evidence could not have been obtained by due diligence in trial under Rule 59(b); (3) extrinsic fraud; (4) misconduct of an adverse party; (5) the judgment has been satisfied or the judgment upon which it is based has been vacated, or it is no longer applicable; (6) the party has prospective application for relief from the operation of the judgment made within reasonable time, not more than one year after the judgment was entered or taken effect; (7) the judgment does not affect the finality of the judgment. This rule does not require an independent action to set aside a judgment or proceeding, or to grant relief personally notified as provided in Rule 60(c) to set aside a judgment or proceeding coram nobis, coram vobis.

of review, are abolished, and the relief from a judgment shall be by writs or by an independent action.

OF THE CASE

accounting firm, was sued in a for gross negligence. The plaintiff a government securities. ESM almost loss, separate from its trading Marwick's accountants' report, the financial statements of Wuv's, dict in 1983 of approximately \$4.5 punitive damages, was affirmed by Court of Appeal without opinion. er appeal to the Supreme Court of ce without opinion by an intermediate Rule of Appellate Procedure 1984 Peat Marwick paid the judgment a total of nearly \$5 million. App.

months after the jury verdict, the mission filed an injunction action against ESM and its affiliated companies. ESM was placed into receivership by order of the respondent was appointed Receiver. The massive 10 year-long fraud gradually unfolded. ESM was never profitable, throughout its existence. It received reports on its financial statements from Peat Marwick, only Alexander Grant & Co., only that firm's audit engagement partner was sentenced to a substantial term in prison for his role in the fraud. The efficiency when finally uncovered in 1984. The three ESM principals

are all presently incarcerated having received lengthy sentences. App. 25a-26a.¹

On December 23, 1985, Peat Marwick filed this independent action under Rule 60(b) by way of a proof of claim in the district court below, which sought recovery of the amount paid in satisfaction of the judgment along with the interest and costs. App. 21a-29a. It alleged that one feature of the fraud later uncovered by the SEC action had been the 1983 state court trial and pre-trial proceedings. Specifically, it alleged that two of ESM's principals, with their attorney's knowing involvement, perjured themselves at trial when they asserted they had relied on the Wuv's audited financial statements (which included a significant related-party transaction), and that ESM's attorney knowingly produced false financial statements in response to a discovery demand and knowingly withheld other responsive records. App. 26a-28a.

Treating the proof of claim as a complaint and respondent's objection to it as a motion under Fed. R. Civ. P. 12(b)(6), the district court dismissed. The court found the allegations did "not constitute extrinsic fraud or 'fraud upon the court,' which is the only species of fraud that would entitle it" to relief from the earlier judgment "more than one year after it was entered." App. 12a.

The court of appeals affirmed, concluding that ESM's fraud "had nothing to do with the negligent audit for which Peat Marwick was found liable" and that the trial attorney's knowledge and concealment of the fraud did not amount to "fraud on the court." App. 5a, 7a.

1 ESM's principals caused the ever-increasing losses of ESM Government Securities, Inc. to be reflected on the books of an affiliate, ESM Financial Group, Inc., while cash for operations of the former company was obtained from investors who were misled into believing that the company was sound. An intercompany account was created to reflect a payable from ESM Financial Group, Inc. to ESM Group, Inc. By accruals of interest on this "payable," the latter company was made to appear profitable until the very end. In fact, all of the companies had been insolvent since 1980, if not before. App. 25a.

REASONS FOR GRANTING THE WRIT

In the past 14 months, the Third and Eleventh Circuits rendered sharply conflicting answers to the first question posed, one that has bedeviled the courts since 1948. The Third Circuit permitted an independent action for relief from a prior judgment on grounds of ordinary fraud practiced by one party upon the other. The Eleventh Circuit denied relief, effectively limiting authority for the independent action to an extraordinary degree of "fraud upon the court" beyond even that of perjured testimony.

I.

Latest Circuit Conflict Over An Historically Divisive Issue Requires Resolution By The Court.

The decision below—that only "extrinsic fraud" or "fraud on the court" will justify an independent action under Rule 60(b)—flatly contradicts a contemporaneous decision of the Third Circuit, *Averbach v. Rival Manufacturing Co.*, 809 F.2d 1016 (1987), holding that an independent action will lie for "intrinsic fraud" between the parties (a false answer to an interrogatory). While a current and palpable conflict between two circuits is traditionally a ground for the Court's review, what is at issue here is more than that. It is the latest manifestation of a conflict that has divided the federal and state courts for over a hundred years, originating in *United States v. Throckmorton*, 43 U.S. 61 (1878), which was apparently but not explicitly overruled by *Marshall v. Holmes*, 141 U.S. 589 (1891).

Since the adoption of the Federal Rules of Civil Procedure, and especially the 1946 amendment to Rule 60(b), it was assumed that the "extrinsic"- "intrinsic" distinction had been abandoned, at least for the federal courts. But because of a textual quirk, the distinction persists and has even divided the leading scholars on federal practice, with Professors Moore and

side and Professors Wright and Miller on the

on began in 1878, when the United States sought an old decree which had been obtained by means of a forged instrument and perjured testimony. The Court observed that equitable belief could only lie "intrinsic or collateral," to the matter tried by the U.S. at 68. In 1891, the Court in *Marshall* ostensibly with *Throckmorton* by stating precisely to the effect that a forged instrument and false testimony would be a cause of *Marshall's* vague reference to *Throckmorton* at 596, the intrinsic-extrinsic distinction and disparities of treatment continued. They continued, for example, the Seventh Circuit's unsuccessful attempt to certify the vexing question to the Court, *Id.*, 162 U.S. 435) until 1948 when amended Rule 60(b) became effective. And then they continued in the face of

to the Advisory Committee, the amendment to Rule 60(b), either by motion brought within one year of the judgment or by independent action, relief from a prior judgment on grounds of fraud. But, while that part of the Rule authorizes relief by motion defines fraud broadly, "whether fraud be committed intrinsic or extrinsic," Rule 60(b)(3), the clause providing for an independent action after the expiration of one year is otherwise silent. The Advisory Committee recommended, however, that, in addition to its express authorization of relief by motion, fraud may also be urged as a basis for independent action "insofar as established doctrine permits." R.D. 433, 479 (1946). The third and concluding sentence of the rule authorizes relief in cases of "fraud upon the

They join in condemning the distinction; the former conclude that the view engrafts it upon the Rule, the latter not. Compare 7 J. Lucas, *Moore's Federal Practice* ¶ 60.37 (2d ed. 1987) with Wright & A. Miller, *Federal Practice and Procedure* § 2868

Thus, the three categories of relief are only procedural relief. Chiefof Justice's opinion:

"Neither party permitted the action to distinguish itself from 1021.

Nonetheless, including "extrinsic" relief has elapsed. The court, "even if it is in the district court, relief. The

3 In e and in made only b

sub if r cas pra tai de the 55 wr eq C. 22 th de sa lin Ia

fraud in its various manifestations has Rule 60(b), the first two distinguished the third describing a distinct ground for motions makes this clear in his *Averbach*

of Rule 60(b) nor its legislative history which would limit an independent motion for judgment to 'fraud on the court' as opposed to 'fraud of some other sort.'" 809 F.2d at

unanimity of courts over the ensuing 40 years, the one below, has reintroduced the requirement whenever more than one year has elapsed from the date of judgment. They have done so usually by distinguishing "intrinsic fraud" with "fraud upon the court." The final saving clause embracing the latter describes an entirely discrete ground for motions based on the so-called "fraud on the

Rule 60(b) does not distinguish between motions for fraud except that the former must be brought within one year and the latter are limited by the various limitations, Judge Gibbons added:

One may ask what was the purpose of the drafters in adopting (1), (2) and (3) motions to a one year time limit as a substantive time bar. The answer, as is so often the case with the Federal Rules of Civil Procedure, lies in the former practice. Before their adoption, there were terms of court, and certain methods of obtaining relief from judgments were available after the expiration of the term at which they were entered. *E.g.*, *United States v. Mayer*, 235 U.S. 210, 17 S.Ct. 100, 59 L.Ed. 100 (1915). When both the terms of court and the common law writs were abolished, the time limit with respect to some motion for relief from judgment or the former common law writs was substituted. See 11 *Federal Practice and Procedure* § 2866, at 100. Under the old practice, however, the expiration of the term had no effect upon the timeliness of an independent motion for judgment. The rule carries forward this practice. The motion procedure is subject to a one year time limit but not to the independent action for fraud.'

Id.

in *Hazel-Atlas Glass Co. v.*
38 (1944), which held that a
r to set aside a judgment ob-
the presence of laches or lack

d to the attention of the court
Marshall v. Holmes.⁴ Judge
presumably in light of Elev-
earlier Fifth Circuit decisions,
Manufacturing Co., 320 F.2d
the extrinsic-intrinsic dichot-
ow relied on and quoted from
e, 761 F.2d 1549 (11th Cir.
d the independent action to
rt below purported to eschew
trinsic dilemma altogether, it
ning that has perpetuated the
those bringing independent
Peat Marwick's allegations of
in the fraud were effectively
e type of fraud which the liti-
not prevent a party from gain-
of justice." App. 6a.

d forward a long and tortured
ced a host of unjust results.
ed how manipulative courts
See, e.g., Note, Federal Rule
nts, 61 Yale L.J. 76, 77 n.4
courts has been the desire for
originally in *Throckmorton*, of
earlier Third Circuit opinion,
n rebuttal: "We believe truth

insic' distinction which is based on a
Throckmorton . . . was overruled, if it
Holmes. . . ." *Averbach v. Rival*
2d at 1022.

is more important than the tr
v. Shallcross, 106 F.2d 949, 9
U.S. 624 (1940). As Justice

"For these reasons we a
ity to attempt a distinct
matter.' . . . Plainly, th
gation is the lesser evil
321, 330, 88 A.2d 204
Moore).

Since 1948, the theoretical
quirement has been the text
text obliterates any differen
Court should grant certiorar
cuit's explication of Rule 60
least to end this Sisyphean e
sion is enough.

B. "The perpetuation of
has led the federal courts in
cause the distinction is unnec
tially productive of injustices
finality." Comment, *Rule 60*
eral Reform, 60 Calif. L. Rev.
tion echoes what has been
commentators for nearly a c
the British courts, *e.g., Cole*
the Canadian, *Johnston v. I*
1905), along with the minori
ject the distinction. A simila
into amended Rule 60(b)(3)
now confined in the federal c
the saving clause.

Because fraud is inherentl
ten occur, if at all, more tha
why the independent action i
dent action to "extrinsic fra
eral courts since 1948 has n

it." *Publicker*
ert. denied, 308

ney into futil-
ic and intrinsic
f vexatious liti-
mmas, 9 N.J.
ting Professor

insic fraud re-
ough that very
sic fraud. The
the Third Cir-
if not that, at
years of confu-

insic distinction
consistency, be-
onal, and poten-
the interests of
proposal for Gen-
That condemna-
ble courts and
ng rationale led
2 Q.B. 36, and
724 (Ont. C.A.
al courts, to re-
cifically written
persists, albeit
nt actions under

discovery will of-
dgment. That is
ing the indepen-
majority of fed-
the discredited

The district court simply classified all of this as "fraud" and dismissed. App. 12a-18a. The court of appeals took a more elliptical tack. First, it pointed to the truism that fraud had nothing to do with Peat Marwick's audit. The issue in the state trial. Ignoring the Rule 60(b) allegations of reliance and lack of auditor independence, the court held that ESM's fraud did not prevent Peat Marwick from raising a defense to the negligence claim, because the fraud could only have been introduced to attack the credibility of the witnesses.⁵ Despite this obvious impact on the integrity of the fact-finding process and on the core issue of reliance, the court of appeals concluded that fraud by the parties, for example, the perjury of ESM's principals ("businessmen") and its outside auditor ("accountants") was raised within one year of judgment, and that the absence of attorney involvement, "even if true . . . do not constitute fraud on the court." App. 5a-7a.

The foregoing reasoning is illustrative of that expansive, long line of opinions requiring proof of "extrinsic fraud." Note, *Attacking Fraudulently Obtained Judgments in Federal Courts*, 48 Iowa L. Rev. 398, 408-09 (1963). It is not only a craving for finality, but insistence upon a defense of negligence that is impossible to meet. For example, in *Peat Marwick v. Peat Marwick*, 91 Cal. 129, 134, 25 P. 970, 971 (1891), one of the earliest cases, where the only (and thus crucial) witness to the transaction in question had been paid for his perjury, the court held that the losing party must somehow be prepared "to expose perjury then and there," that is, at the first opportunity. The trial is his opportunity for making the truth appear. The language is almost identical to what the court of appeals said: "This is the type of fraud which the litigants should have" App. 6a.

⁵ The court also alluded to Peat Marwick's negligence as the basis of the state court judgment. App. 5a, 7a. But the subject matter of the trial with the post-judgment diligence in attempting to uncover the fraud. Cf. *Hazel-Atlas v. Hartford-Empire Co.*, *supra*, 322 U.S. at 246. Even a auditing firm is entitled to an untainted trial.

Hartford-Empire Co., *supra*, it disserves important interests of the judiciary and the legal profession.

The most shocking aspect of the opinion below is its treatment of the attorney's role and its implicit view of the adversary system. Its attempt to distinguish *Hazel-Atlas* is illustrative. The attorney for Hartford in that case had written an article that was published under the name of an expert and then relied on in a patent application and later infringement suit. Justice Black, writing for the majority 12 years later, found that to be "fraud on the court" warranting relief. Although subornation of perjury is presumably worse, the court of appeals stated nonetheless that even if ESM's attorney "knew of ESM's securities fraud, [it] did not have the same impact [as the conduct of the Hartford attorney] on the judicial system." App. 7a. The attorney's knowledge in the present case, it must be remembered, encompassed what was probably the largest securities fraud in our history, and Peat Marwick's allegations in any event went beyond knowledge to participation by virtue of his conduct during discovery and trial.

As for Peat Marwick's other specific allegations, that the attorney knowingly produced false documents and knowingly proffered the perjured testimony of his clients, the court of appeals was equally cavalier:

"They show that ESM's attorney may have known of potential defenses available to Peat Marwick, but this is not fraud on the court. *Kerwit Medical Prods., Inc. v. N & H Instruments, Inc.*, 616 F.2d 833, 387 (5th Cir. 1980). An attorney is expected to present his client's case in the light most favorable to the client and he has no duty to inform the opposing party of potential defenses. *Id.*" App. 6a-7a.⁷

7 Apparently the court believed that petitioner was only deprived of its ability to impeach ESM's principals. (Indeed, had the judge and jury been able to discern by means of such impeachment that a massive fraud was occurring before their very eyes, no doubt the trial would have abruptly ended.) But much more than that was involved. Two of ESM's three principals testified falsely that they relied on the Wuv's

TH
beco
that
length
ity. A
that
For c
7 of
cludi
28) a
Rule
the L
to w
tled,
plain

that standard in the conduct of a case he perpetrates upon the court." 7 *Moore's Federal Practice*, supra 60:33, at 60-359 (footnote omitted).⁹

fundamental flaw in the approach taken by the court of its willingness to disregard the universally recognized professional duty *not* to mislead the court in representing that duty is a better guide to what constitutes "fraud on the court" under Rule 60(b) than the indulgent charter by the court of appeals.

opinions below are reminiscent of Justice Roberts's dissent in *Atlas*, where relitigation was described with abhorrence and *United States v. Throckmorton* with approval. At 261 n.18. Justice Black's opinion for the majority, dissenting, emphasized "the integrity of the judicial process," at 246, in overriding the term rule whose modern incarnation is the 12-month limitation on certain motions under Rule 60(b):

Equitable relief . . . is a judicially devised remedy fashioned to relieve hardships which, from time to time, require departure from a hard and fast adherence to another court-established rule, the general rule that judgments should not be disturbed after the term of their entry has expired. Created

The new ABA Model Rules of Professional Conduct are equally insistent that trial counsel has duties to the judicial process that transcend his client's interest in winning:

Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

• • •

(4) offer evidence that the lawyer knows to be false. . . ."

Rule 3.4 Fairness to Opposing Party and Counsel

(a) A lawyer shall not:

(1) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document . . . having potential evidentiary value . . .

(2) falsify evidence, counsel or assist a witness to testify falsely . . ."

to avert the evil
dure has always
ables it to meet
intervention, an
rect the particul
322 U.S. at 248

The most egregious
present case was th
fraud, which was la
mony he elicited on
view, the Court can
beyond the pale in a
side, 475 U.S. 157, 1

"This special d
frauds upon th
perjury is as mu
jurors by way o
administration

CONCLUSION

s, this petition for a writ of certiorari

Respectfully submitted,

PHILIP A. LACOVARA

Counsel of Record

HUGHES HUBBARD & REED

1201 Pennsylvania Avenue, N.W.

Washington, D.C. 20004

(202) 626-6200

VICTOR M. EARLE, III

CAHILL GORDON & REINDEL

80 Pine Street

New York, New York 10005

(212) 701-3000

& Co.

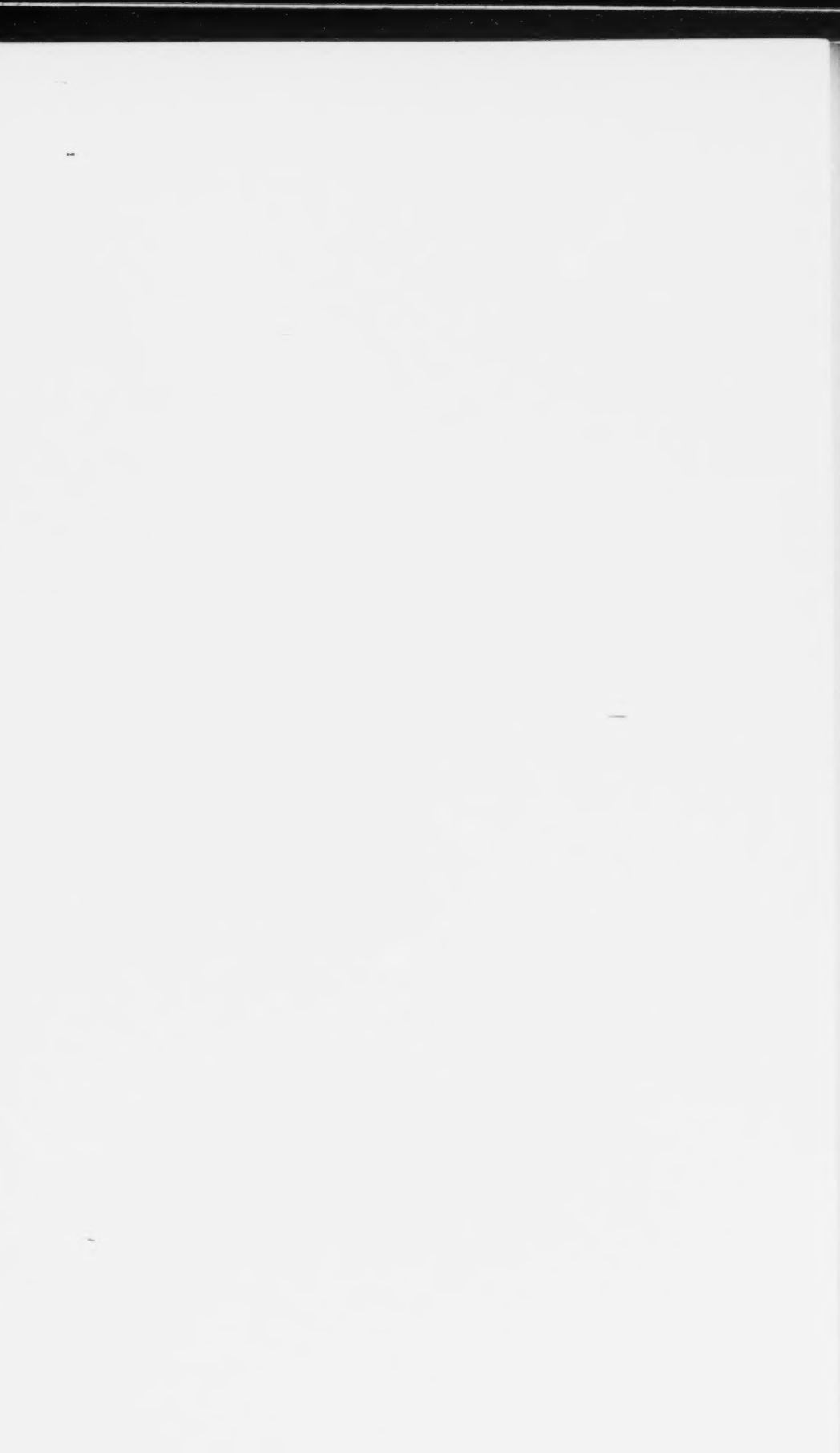
10055

WNS

al Center

ulevard

395



APPENDICES

A

Be fo

•
Southern

APPENDIX A

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT.

Jan. 7, 1988.

No. 86-5958.

& EXCHANGE COMMISSION,

Plaintiff,

vs.

GROUP, INC., et al.,

Defendant-Appellee,

BRIDGEMAN, MITCHELL AND CO.,

Claimant-Appellant.

United States District Court for the
Southern District of Florida.

and ANDERSON, *Circuit Judges,*
ATKINS*, *Senior District Judge.*

Judge Atkins, Senior U.S. District Judge for the
Southern District of Florida, sitting by designation.

district court's dismissal of a Peat, Mitchell and Co. ("Peat Group, Inc. ("ESM"). ESM has on the request of the Securities ("SEC"). In its claim, Peat district court set aside a Florida judgment against it on the grounds that the judgment was void. The district court denied Peat's motion for judgment and dismissed its claim for action under Fed.R.Civ.P.

Peat Marwick in a Florida report had been "grossly deficient" in its audit of audited financial statements of Wuv's), a company in which ESMA asserted that it had issued an "unqualified" audit report. Wuv's was not a "going concern" and had rendered a "qualified" audit of its financial statements.

Peat Marwick contends missing its claim for failure to obtain a reasonable relief from the state. The court treated Peat Marwick's claim as a matter of standard. When reviewing the claim under 12(b)(6), we take all alleged facts as true. Proof of claim to be well-pleaded. Testing the sufficiency of the claim. *Food Machinery & Chemical Corp. v. S.Ct.* 347, 348-49, 15 L.Ed.2d 347, 348-49. The Supreme Court has stated that the sufficiency of a complaint may be dismissed for failure to state a claim. No doubt that the plaintiff could state his claim which would entitle him to relief. 355 U.S. 41, 45-46, 78 S.Ct. 116, 117. *Shopper, Inc. v. Georgia* (11th Cir. 1986) (quoting

had a cumulative

at Marwick filed
the \$4.9 million
Marwick in Florida
fraud in ESM's
Marwick alleged
etuate that fraud.
s securities fraud
it did not receive

ief from the 1984
Peat Marwick's
f proven, did not
could not provide
ore than one year
llowed.

court erred in dis-
action for equita-
The district court
R.Civ.P. 12(b)(6)
s pursuant to Rule
at Marwick in its
for the purposes of
Process Equip. v.
S. 172, 174-75, 86
addition, the Su-
le" for appraising
plaint should not
it appears beyond
acts in support of
Conley v. Gibson,
0 (1957); *Tiftarea*
2d 1115, 1117-18

fraud, accident, or mistake which prevented in the judgment from obtaining the benefit (4) the absence of fault or negligence on the part of the claimant; and (5) the absence of any adequate remedy.

Bankers Mortgage Co. v. United States, 423 F.2d 1001 (9th Cir.), cert. denied, 399 U.S. 927, 90 S.Ct. 2242, 20 L.Ed.2d 1001 (1970) (quoting *National Surety Co. v. State Bank*, 299 U.S. 599 (8th Cir. 1903)).

In the case at bar, Peat Marwick cannot establish the elements necessary to maintain an independent action which it asserts tainted the outcome of the state action. Nothing to do with the negligent audit for which Peat Marwick was found liable. Peat Marwick did not have a cause of action for negligence which it cannot establish because of ESM's fraud. Rather, the fraud would have been introduced only to a limited ability of ESM's witnesses. Thus, the second and third elements of an independent action do not exist here. Peat Marwick cannot establish the fourth element of an independent action, which requires the claimant to be free from negligence, because it was negligent in the preparation of the audit report. This negligence was the basis of the state action. Therefore, because Peat Marwick has not shown that it can maintain an independent action,² it cannot maintain there was fraud on the court in order to obtain relief from judgment. See Fed.R.Civ.P. 60(b).

Traveler's Indemnity Co. v. Gore, 761 F.2d 1001 (9th Cir. 1985) (per curiam) (affirmed on opinion of district court) defines "fraud on the court" as:

embrac[ing] only that species of fraud which attempts to, defile the court itself, or is a fraud by officers of the court so that the judicial process cannot perform in the usual manner its important

² Because Peat Marwick has not set forth the elements of an independent action, we do not decide whether its claim establishes "intrinsic" fraud, nor do we discuss the type of fraud a party must establish to obtain relief from judgment.

t
;
-
.
h
3
,
-
d
d
k
o
d
-
-
s
t
-
r
-
y-
d
t
y-
r.
e-
-
d
n-
l-
n-
or
to

have known of potential defenses available to Peat Marwick, but this is not fraud on the court. *Kerwit Medical Prods., Inc. v. N & H Instruments, Inc.*, 616 F.2d 833, 837 (5th Cir. 1980). An attorney is expected to present his client's case in the light most favorable to the client and he has no duty to inform the opposing party of potential defenses. *Id.*

Under certain circumstances, attorney misconduct may constitute fraud on the court. *See Hazel-Atlas*, 322 U.S. 238, 64 S.Ct. 997. However, *Hazel-Atlas* is distinguishable from the instant case because the attorney in that case was a direct participant in a deliberate plan conceived for the purpose of defrauding the opposing party, the patent office and the Court of Appeals.

In *Hazel-Atlas*, an attorney had written an article extolling the virtues of a patented process for "glass pouring" and he had convinced a supposedly unbiased expert in the field to sign the article as the author. The attorney then relied on the article as authority in his arguments to the Third Circuit in a patent infringement action. *Id.* at 240-41, 64 S.Ct. at 998-99. The Supreme Court concluded that this conduct amounted to a "wrong against the institutions set up to protect and safeguard the public." *Id.* at 246, 64 S.Ct. at 1001.

By comparison, ESM's attorney, even if he knew of ESM's securities fraud, did not have the same impact on the judicial system. Peat Marwick does not allege that ESM's counsel aided in the securities fraud which is the underlying reason Peat Marwick seeks relief from judgment. Moreover, the securities fraud was a separate issue from Peat Marwick's "grossly negligent" audit which was the focus of the state trial. At best, Peat Marwick's allegations against ESM's attorney amount to a failure to disclose information which would have been helpful in Peat Marwick's defense. This does not constitute fraud on the court. The fraud alleged here went strictly to the credibility of witnesses, not to any miscarriage of justice.

In sum, the district court examined Peat Marwick's claim and allegations closely and, after oral argument, determined that Peat Marwick's claim against the Receiver should be dismissed for failure to state a cause of action upon which relief could be

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 85-6190-Civ-Gonzalez

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

—vs.—

GROUP, INC., ESM GOVERNMENT SECURITIES, INC.,
SECURITIES, INC., and ESM FINANCIAL GROUP, INC.,

Defendants.

ORDER DISMISSING CLAIM OF
PEAT, MARWICK, MITCHELL AND COMPANY

THIS MATTER came before the Court on the Equity Receiver's Objection to Peat, Marwick, Mitchell and Company's ("Peat, Marwick") Proof of Claim. Peat, Marwick had filed its claim against ESM Group, Inc. ("Group"), one of the defendants, which has been placed into receivership upon request of the United States Securities and Exchange Commission. As Tew is the duly appointed, qualified and acting Equity Receiver for Group.

Peat, Marwick had filed a proof of claim pursuant to an order of this Court fixing the last date for creditors to file their claims against Group. The claim was based upon Peat, Marwick's payment to Group of a Florida Circuit Court judgment rendered in favor of Group and against Peat, Marwick in the amount of \$4,477,355.33, plus interest in the amount of \$352.83, for a total payment of \$4,942,708.16. The judgment was entered on January 18, 1984, after a jury found Peat,

Marwick grossly misstated
about the financial condition
("WUV's"), a now defunct
into receivership on

The Receiver, in its
claim was an improper
judgment vacated on appeal
try of the judgment.
committed a fraud
thus giving this Court
the judgment more
suant to its Order of
Marwick to Establish
Receiver treated the
as a motion to dismiss
Rules of Civil Procedure
by Peat, Marwick in
ceiver's Objection,
deemed by the Court
of testing the sufficiency

Peat, Marwick and
their officers and directors
which they defrauded
was committed in part
statements and opinions
the ESM companies
mez, a partner at Arthur
auditor for the ESM
involved the passing
ties, Inc. ("Government
tion, ESM Financial
thus deceived into
sound.

Peat, Marwick and
ation of a false "re
company account re
the parent of Govern
payable created the

other ESM companies had likely been \$300 million. At the time of the institution of the receivership, the ESM companies had a cumulative net worth of \$300 million.

Peat, Marwick alleged that the fraud was done with the participation of certain shareholders and companies during the relevant periods of time, as testified at the Circuit Court trial. Because of the fraud and the participation in the fraud, the Circuit Court action, Peat, Marwick did not receive a fair trial, and that the fraud upon the court, which would entitle Peat, Marwick to equitable relief from the judgment entered prior to the filing of Peat, Marwick's receivership action. More specifically, Peat, Marwick alleges of fraudulent conduct on the part of Peat, Marwick and its attorneys: (1) perjury by several of its attorneys on behalf of Group; (2) the turnover of documents and discovery of documents which reflect the true status of Group and the other ESM companies; (3) the denial and concealment of ESM's bleak financial condition by Group's attorney. For the reasons discussed above, the Court holds that the fraud alleged by Peat, Marwick is not extrinsic fraud and not "fraud upon the court." Peat, Marwick's claim must be dismissed.

CONCLUSIONS OF LAW

It is determined to be an issue of whether Florida Rule of Civil Procedure 1.540(b) or Federal Rule of Civil Procedure 65(d) governs the issues raised by the Receiver's objection to the Florida rule should apply, *see* *Compkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 100, 101. Peat, Marwick argued that the Federal Rule of Civil Procedure 65(d) should apply. *Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 13 L.Ed. 2d 491. The Court holds that Peat, Marwick's claim must be dismissed regardless of which rule is applied.

Peat, Marwick's allegations do not constitute extrinsic fraud or "fraud upon the court," which is the only species of fraud that would entitle it to vacate the state court judgment more than one year after it was entered. Federal Rule 60(b) states:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The judgment shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. . . . This rule does not limit the power of the court to entertain an independent action to relieve a party from a judgment, order, or proceeding, . . . or to set aside a judgment for fraud upon the court. . . . [T]he procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Fed. R. Civ. P. 60(b).

The comparable Florida Rule 1.540(b) is nearly identical; however, it lacks clause (b)(6). The Florida Rule in fact was patterned after Federal Rule 60(b). *DeClaire v. Yohanan*, 453 So.2d 375, 377 (Fla. 1984).

The long-standing policy of favoring an end to litigation underlies the one-year limitation imposed by both rules. Because public policy favors an end to litigation, the grounds for setting aside a judgment more than one year after entry are extremely

mitted. In very rare circumstances, involving a "fraud upon the court," a litigant's misconduct may deprive his opponent of access to a fair and impartial system of justice. In these circumstances, the opposing party is rendered totally unable to present its case to a fair and impartial trier of fact. When a party's "fraud upon the court" has so infected the system that the opposing party literally is deprived of its access to a fair and impartial system of justice, a judgment may be set aside after the one-year period has expired. *See, e.g.,* Rule 1.540, *Fla. R. Civ. P.*; Rule 60(b), *Fed. R. Civ. P.*

As articulated by most courts, fraud upon the court relates to an impairment of the judicial process; it has no relation to fraud between the parties. *Moore's*, for example, defines "fraud upon the court" as follows:

"Fraud upon the court" should, we believe, embrace only that species of fraud which does or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication, and relief should be denied in the absence of such conduct.

J. Moore & J. Lucas, *Moore's Federal Practice*, ¶ 60.33 at 60-60 (2d Ed. 1983).

Both the United States and Florida Supreme Courts have recognized the distinction between fraud among parties and fraud involving the court, both of which are grounds for vacating a judgment. Fraud between parties must be brought to a court's attention within one year after judgment is entered; fraud that prevents the functioning of the judicial process may be brought to a court's attention at any time. *See, e.g., United States v. Throckmorton*, 98 U.S. 61, 25 L.Ed. 93 (1878); *DeClaire v. Yohanan*, 453 So.2d 375 (Fla. 1984). Misconduct among parties to litigation is most often defined as "intrinsic" fraud, while misconduct that impairs the system is defined as "fraud upon the court" or "extrinsic" fraud.

The United States Supreme Court long has held that "extrinsic" fraud contemplates an impairment of the judicial machin-

so pervasive as to prevent a party from having the opportunity to present its case. In *United States v. Throckmorton*, 61, 65-66, 25 L.Ed. 93 (1878), the court stated:

...the unsuccessful party has been prevented from explaining fully his case, by fraud or deception practiced upon him by his opponent, as by keeping him away from the trial by a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney suddenly or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and to grant a new case for a new and a fair hearing.

Intrinsic fraud includes misconduct that infects the trial process or lawyers, and not solely the parties to the lawsuit. The United States Supreme Court's definition of extrinsic fraud has been adopted by the Florida Supreme Court in *DeLoach v. DeLoach*, 453 So.2d 375 (Fla. 1984). In that case a party sought to set aside a final judgment of dissolution three years after its entry on the ground that the husband had filed a false financial statement, but the trial court refused to set aside the judgment. The intermediate appellate court reversed the trial court's judgment and vacated the judgment, holding that the filing of a false financial statement constituted a "fraud upon the court." The Florida Supreme Court disagreed, holding that the filing of a false financial statement was not the kind of extrinsic fraud that under the *Throckmorton* analysis would enable a court to set aside a judgment more than one year after it was entered. Rather, the court held that the husband's act constituted intrinsic fraud that could be asserted within one year under *Fla. R. Civ. P.* 1.605, 53 So.2d at 380.

The Eleventh Circuit has also followed the *Throckmorton* analysis in *Travelers Indemnity Company v. Gore*, 761 F.2d

1549 (11th Cir. 1985). The plaintiff sought to set aside a judgment of the jury under 60(b)(3) of the Federal Rules of Civil Procedure, not because the judgment was based on an error of law, but because the clause of the contract was void and the judgment was based on a "fraud upon the court."

Pe...
fr...
St...
de...
ac...
ac...
di...
de...
n...
th...

Id. at 1550.
Teamsters v. United Brotherhood of Carpenters and Joiners of America, 430 U.S. 329, 340 (1977).

Pea...
its the...
ceiver...
of the...
upon...
or D...
Group...
tion t...
finan...

, the Court granted a motion to dismiss the relief from a judgment pursuant to Rule 60(b)(1) because more than one year had elapsed since the entry of the judgment. The Court further held that the action could not be an independent action within the savings clause. *Id.* Holding that an independent action to set aside a judgment more than one year old must be grounded on "fraud, tort, or crime," the court stated:

"Extrinsic fraud which will not support relief through an independent action. *See United States v. Throckmorton*. . . . Under the *Throckmorton* standard, a party must lay a foundation for an independent action such that it was not in issue in the former action and it have been put in issue by the reasonable efforts of the opposing party. . . . Perjury by a party is not extrinsic fraud because the opposing party is presumed to have fully presenting his case and raising the issue of perjury in the original action.

"Extrinsic fraud and fabricated evidence are evils that can and should be exposed at trial, and the legal system encourages and expects litigants to root them out as much as possible. . . . Fraud on the court is therefore distinguished from the more egregious forms of subversion of legal processes. . . . Those we cannot expect to be exposed to by the normal adversarial process.

Great Coastal Express v. Brotherhood of Marine Workers, 1349, 1357 (4th Cir. 1982).

"The Group had an adequate opportunity to express its views in its proof of claim, its reply to the Respondent's motion, and in oral argument before the Court. None of these, however, would constitute extrinsic fraud within the meaning of *Throckmorton*, *Travelers Indemnity Co. v. Peat, Marwick, Main & Company*, or *Travelers Indemnity Co. v. Peat, Marwick's* description of extrinsic fraud. Upon the Court boils down to its assertion that the subsidiary, Government, had issued false information. The Group could not have reasonably relied

financial statement prepared for Marwick, had it known of Governmental statements, it could have im-
 group's witnesses relating to its
 financial statement. However, as was
 in *Travelers*:

Gore obtained his judgment in
 of perjured testimony to support
 his action is an attempt to relitigate
 the issue, an issue that was necessarily
 judicial.

that Group, through its witnesses,
 it. As pointed out in *Traveler's*,
 and that should be rooted out early
 could not have prevented Peat,
 judicial system of justice. At best, it
 United States and Florida Supreme
 it have expressly held to be insuf-

eral allegations concerning pur-
 s attorney in the Broward Circuit
 ns include that the attorney was
 condition and of the fraud allegedly
 customers and creditors. Even if
 however, it is not the sort of mis-
 would constitute fraud upon the
 knowledge by Group's attorney of a
 to Peat, Marwick. This does not
 art, for a plaintiff is not obligated
 potential defenses that the defendant
 claims. *Kerwit Medical Products*,
Inc., 616 F.2d 833 (5th Cir. 1980);
of the University of Georgia, 90

ny v. Hartford Empire Co., 322
 .Ed. 1250 (1944), relied upon by

Peat, Marwick, is not co-
 distinguishable here for
 by the Eleventh Circuit i

The court finds *Ha*
 stant case in that he
 volvement in Gore's
 that the normal, in
 heard the insurance
 any manner by the

761 F.2d at 1551, 1552.
 relating to Group's attor-
 interference with the imp-
 Court presiding over the

Finally, Peat, Marwic
 grants a court authority t
 more than one year after
 clause is illogical as a
 stated in *Moore's*:

Further, the maxim
 plies to clause (1) a
 after the year perio
 relief under clause
 (2), and (3).

7 *Moore's Federal Pract*
 most unanimous on tha
States, 335 U.S. 601, 336
 (1949); *William Skillings*
tion Ltd., 594 F.2d 107

The facts asserted in
 sponse to the Receiver's
 the hearing on the Rece
 constitute fraud upon th
 sufficient to grant relie
 after its entry. As cou

persuasive. That case is
ons it was distinguished
supra:

inguishable from the in-
allegation of attorney in-
d no evidence to suggest
tion of the court which
e was interfered with in
ated by Gore.

t, Marwick's allegations
, would not show any in-
on of the state Circuit

at Federal Rule 60(b)(6)
gment for intrinsic fraud
wever, this reading of the
tutory construction. As

ation of one year that ap-
would be meaningless, if
movant could be granted
s covered by clauses (1),

50-266. The case law is al-
e.g., *Klapprott v. United*
. 384, 93 L.Ed. 266, 1099
es v. *Cunard Transporta-*
99).

N

's Proof of Claim, its re-
and its arguments made at
n, even if proven, do not
is the only kind of fraud
ment more than one year
at oral argument, Peat,

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-5958

SECURITIES & EXCHANGE COMMISSION

—vs.—

ESM GROUP, INC., et al.,

Defendant

PEAT, MARWICK, MITCHELL AND COMPANY

Claimant

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING
SUGGESTION(S) OF REHEARING

(Opinion January 7, 1988, 11 Cir., 1988, —
February 10, 1988)

Before:

JOHNSON and ANDERSON, Circuit Judges
and ATKINS*, Senior District Judge

* Honorable C. Clyde Atkins, Senior U.S. District Judge,
Southern District of Florida, sitting by designation.

f,

e,

at.

the

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

FORT LAUDERDALE DIVISION

Case No: 85-6190-Civ-Gonzalez

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

—vs.—

ESM GROUP, INC., ESM SECURITIES INC., and
ESM FINANCIAL GROUP, INC.,
Defendants.

AMENDED PROOF OF CLAIM

1. [If claimant is an individual claiming for himself] The undersigned, who is the claimant herein, resides at*

[If claimant is a partnership claiming through a member] The undersigned, whose offices are located at Beasley, Olle, Downs & Keihner, 2700 Southeast Financial Center, 200 South Biscayne Boulevard, Miami, Florida, is counsel for the claimant Peat, Marwick, Mitchell & Co., a partnership composed of certified public accountants, doing business at *One Corporate Plaza, 100 E. Broward Blvd., Ft. Lauderdale, Florida and is authorized to make this proof of claim on behalf of the partnership.

[If claimant is a corporation claiming through an authorized officer] The undersigned, who resides at* _____ is the _____ of _____, a corporation organized under the laws of _____,

* State mailing address.

This claim is not subject to any setoff or counterclaim.

No security interest is held for this claim. _____

If a security interest in the property of the debtor is claimed] undersigned claims the security under the writing referred in paragraph 4 hereof [or under a separate writing (or duplicate of which) is attached hereto, or under a separate writing which cannot be attached hereto for the reason set forth in the statement attached hereto]. Evidence of perfection of such security interest is also attached hereto.

10. This claim is a general unsecured claim, except to the extent that the security interest, if any, described in paragraph 9 is sufficient to satisfy the claim.

plus interest from
\$4,942,708.16 November 29, 1984

Total Amount Claimed

NOTED:

Claim Number _____

(For Office Use Only)

Name of Creditor: Peat, Marwick, Mitchell & Co.
(Print or Type Full Name of Creditor)

or

Address of Creditor: One Corporate Plaza
100 East Broward Boulevard
Fort Lauderdale, Florida

Signature: /s/ James W. Beasley, Jr.

Signature of Authorized Representative (Also Type)

Beasley, Olle, Downs & Keihner

2700 Southeast Financial Center

200 South Biscayne Boulevard

Miami, Florida 33131-2395 / (305) 371-5400

Its: Attorney

Title or Position (If Applicable)

CLAIM C

1. On March 1, 1988, the "Group") filed a lawsuit against PMM & Co. ("PMM") in the style of that lawsuit, *Marwick, Mitnick & Co. v. PMM*, No. 84-293. The lawsuit, Group PMM, amounted to a claim for financial statements in which Group PMM during the period of the lawsuit. That case was decided on January 18, 1989, with a verdict for \$400,000.00 compensatory damages and \$10,000.00 punitive damages. Florida Fourth District Court No. 84-293. The court held that PMM paid the damages for a total of \$410,000.00.

2. The essence of the claim was that PMM was negligent in its opinion, dated December 31, 1988, that PMM Inc. was in financial trouble and that PMM should have taken steps to prevent PMM. One key financial problem was a receivable which was allegedly unpaid by PMM. A claim against PMM was filed on March 14, 1989.

from April 29, 1980 to August 27,

1985, the Securities and Exchange Commission for injunctive and other relief against E.S.M. Government Securities, Inc., E.S.M. Financial Securities, Inc., and E.S.M. Aviation Securities, Inc. On the same day, the defendant corporations, were placed in receivership by order of this court. Pursuant to that order, attorney Thomas Tew was appointed receiver of the assets of E.S.M. Group, Inc. One of the assets was E.S.M. Government Securities, Inc., in bankruptcy. The other E.S.M. companies were also in receivership.

In 1985, the receiver for E.S.M. Group, Inc., filed a petition for the Condition of the E.S.M. companies. The petition alleged that the insolvent conduct of the E.S.M. companies, involved the maintenance in business of the companies after their actual insolvency, by causing the companies to incur losses of E.S.M. Government Securities, Inc. reflected on the books of a related corporation, E.S.M. Financial Group, Inc., while cash for E.S.M. Government Securities, Inc. was obtained from investors who were fraudulently led to believe that the companies were financially sound. An intercompany account was used to reflect a payable from E.S.M. Financial Group, Inc. to E.S.M. Group, Inc. By accruals of intercompany accounts, E.S.M. Group was thus made to appear solvent. Upon the discovery of this fraud in March 1985, the companies had been insolvent since at least 1975. From their inception during the years 1975-77, the companies had never been profitable, and upon the discovery of the fraud in March 1985, the companies had a cumulative deficit in excess of \$10 million.

The fraud was perpetrated with the knowledge and participation of Ronnie R. Ewton, who was majority shareholder, as chairman of the board or as presi-

dent of all the E.S.M. companies during the period of the Wuv's transaction up until March 1985 when the fraud was made public. Jose Gomez, the Alexander Grant & Co. partner who served as partner in charge of audits for the E.S.M. companies during the same period, was also a participant in the fraud. The receiver for the E.S.M. companies has filed an action in this Court against Mr. Gomez and Alexander Grant & Co., alleging that Mr. Gomez and Alexander Grant & Co. were grossly negligent in their preparation of the audited financial statements of E.S.M. Government Securities, Inc., and in issuing a "clean" opinion as to the financial condition of those companies. The Securities and Exchange Commission has also filed an action before this Court alleging that Mr. Gomez was bribed by E.S.M. to issue a "clean" opinion on the financial statements of the E.S.M. companies' financial statements, at least for the year ended December 31, 1984, and that the financial statements and audit reports at least as far back as 1980 had been prepared in violation of the anti-fraud provisions of the federal securities laws. Mr. Gomez has pleaded guilty to criminal charges of larceny and grand theft brought against him by the State of Ohio for his role in the E.S.M. fraud.

6. Because of the fraudulent manipulation of the E.S.M. companies' accounting records, and the further concealment of that fraud by Jose Gomez, the E.S.M. companies' supposed "independent" auditor, this massive fraud was successfully hidden from numerous state and federal governmental regulatory agencies, as well as from the public, for nearly a decade. The Securities and Exchange Commission had itself failed, in spite of investigation and litigation spanning the years 1977 to 1981 concerning alleged violations by the E.S.M. companies of the federal securities laws, to uncover the massive fraud then being perpetrated.

7. By successfully concealing the fraud in which it was then actively engaged, Group prevented PMM from defending the suit brought against it by Group.

8. In light of the facts disclosed since March 1985 concerning the E.S.M. fraud, Group could not possibly have relied upon the PMM audit report in making the Wuv's investments. Group, by and through its directors, officers, and accountant, had initiated its practice of concealment and fraud by transferring substantial losses to a related company, before it began transferring any funds to Wuv's International. Group was not only insolvent when the so-called investments in Wuv's were made, but its directors, officers, and accountants had specific, particular knowledge of how this fact could be and was fraudulently concealed from the public, Group's investors, and governmental agencies. The alleged financial problems of Wuv's International were trivial when compared to those being concealed in the E.S.M. companies. With this experience in fraud and concealment, neither Group nor its directors, officers, or accountant could have relied upon the portion of the PMM audit of Wuv's that reflected a receivable from its sole shareholder.

9. Had the E.S.M. fraud been known to PMM at the time of trial, PMM would have been able to impeach Group's witnesses, including Mr. Ewton (who was referred to at trial as a "man of his word"), Mr. George Mead (who testified at trial about E.S.M.'s "moral obligations") and Mr. Gomez. Group and its affiliates and executives were held out to the jury and to the court as reputable investment bankers, when in fact they were engaged in perpetrating a massive fraud. The perjured testimony of Group's witnesses was wilfully and purposely falsely given, was material to the issues tried, and controlled the result in the case.

10. The concealment by Group of the fraudulent conduct by Jose Gomez, and his lack of independence as auditor of the related E.S.M. companies, was essential to Group's obtaining a judgment against PMM. Mr. Gomez himself was deposed by PMM's counsel prior to trial, and he and his testimony were repeatedly referred to at trial.

11. The fraud perpetrated by Group against PMM and the Circuit Court included the participation of Group's attorney,

the Court. Group's attorney knew of the because he became intimately familiar with the ition of these [E.S.M.] persons and entities, insolvency of E.S.M., and their extensive illicit d business dealings, and assisted Group in pre- blic from detecting the E.S.M. fraud. Group's ng knowledge of E.S.M.'s false financial state- fraud E.S.M. was perpetrating on the public, Group's scheme to defraud PMM and the Cir- he misconduct of Group's attorney includes, ted to, the following:

ly providing to PMM (in response to PMM's uests) false financial statements about E.S.M. d E.S.M.'s true condition. This affirmative denied PMM the ability to defend itself in the

ly vouching to the court and jury for the credi- grity of E.S.M.'s principals, when he well knew n which E.S.M. was engaged.

ly tendering perjured testimony to the court h testimony was material to the outcome of the

concealed its fraud from PMM by failing to mation during pretrial discovery that would PMM to detect E.S.M.'s fraud. The fraud per- the E.S.M. companies' accounting and finan- as well as the testimony of the companies' d made all of Group's compliance with discov- kewise fraudulent. Group's case against PMM ately planned and carefully executed scheme to d and the Circuit Court, in which Group's attor- participated.

ud perpetrated by Group constituted fraud on extrinsic fraud, entitling PMM to relief from rendered against it. PMM is also entitled to re- ound of newly discovered evidence, which evi-

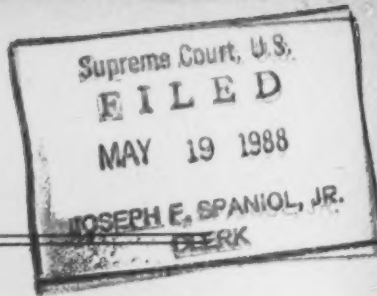
14. Be facts of could no ered the Wuv's li

15. P that the fraudule invalid. entitled amount 1984.

Group's fraudulent concealment of the companies' financial condition, PMM use of reasonable diligence have discovered and its affiliates in the course of the

and to, and demands, a determination rendered against it in favor of Group was and should be set aside or considered as already satisfied the judgment, it is this proceeding against Group in the .16, plus interest from November 29,

(2)
No. 87-1727



In The
Court of the United States
October Term, 1987

— o —
Great Marwick Main & Co.,

Petitioner,

v.

Thomas Tew
— o —
Attorney for ESM Group, Inc., *et al.*,

Respondent.

— o —
Writ of Certiorari To The United States
Appeals For The Eleventh Circuit

— o —
RESPONDENT IN OPPOSITION TO
GREAT MARWICK MAIN & COMPANY
WRIT OF CERTIORARI

— o —
LAWRENCE A. KELLOGG
Counsel of Record
TEW JORDEN & SCHULTE
701 Brickell Avenue
Miami, Florida 33131
(305) 371-2600

BONNIE L. COOPER
TEW JORDEN & SCHULTE
701 Brickell Avenue
Miami, Florida 33131
(305) 371-2600

TABLE OF

TABLE OF AUTHORITIES

SUMMARY OF ARGUMENT

ARGUMENT:

- I. THE ELEVENTH
DOES NOT RAISE
WHETHER INTR
SUPPORT AN INI
FOR RELIEF FROM
- II. THE ELEVENTH
TION OF THE THI
OF RULE 60(b) D
WITH ANY DECIS

CONCLUSION

	Page
.....	ii
.....	1
OPINION	
LICT OF	
UD CAN	
ACTION	
T	1
APPLICA-	
CLAUSE	
ONFLICT	
COURT ...	3
.....	6

SUMMARY OF ARGUMENT

As the opinion by the Eleventh Circuit conflict with any opinion of this Court, or with another circuit court, the Petition for Writ should be denied. The Eleventh Circuit court that Peat Marwick failed to state a claim for relief from the judgment at issue.

—o—

ARGUMENT

I. THE ELEVENTH CIRCUIT OPINION DOES NOT RAISE THE CONFLICT OF WHETHER INTRINSIC FRAUD CAN SUPPORT AN INDEPENDENT ACTION FOR RELIEF FROM JUDGMENT.

A. The Petition for Writ of Certiorari from Peat Marwick Main & Company [Peat Marwick Main & Company] is based on a faulty premise. Peat Marwick asserts that the Eleventh Circuit below held that “intrinsic fraud” or “fraud on the court” will justify independent action under [Federal] Rule [of Civil Procedure] 60(b).” (Pet. p.5).¹ Contrary to Peat Marwick’s characterization of the Eleventh Circuit’s holding, the court expressly declined to address the issue of whether fraud is necessary to support an independent action to set aside a judgment. In fact, the Eleventh Circuit held that because Peat Marwick failed to allege

1. References to Petition for Writ of Certiorari are cited as (Pet. p. —); References to Appendix to Petition are cited as (Pet. App. p. —).

issue precludes the granting of certiorari to review the opinion below on that basis.

B. Peat Marwick's petition does not challenge the circuit court's analysis of the elements of an independent action for relief from judgment or its determination that Peat Marwick could not establish all of the elements necessary to maintain an independent action. Peat Marwick, therefore, has implicitly conceded that the court applied the proper elements to determine whether an independent action could be maintained and reached an accurate conclusion. For this reason, certiorari to review the court's analysis should not be granted.

II. THE ELEVENTH CIRCUIT'S APPLICATION OF THE THIRD SAVINGS CLAUSE OF RULE 60(b) DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

Peat Marwick's second argument challenges the Eleventh Circuit's determination that the actions of ESM's principals and attorney did not constitute "fraud upon the court" within the meaning of Rule 60(b). However, Peat Marwick has once again mischaracterized the holding of the Eleventh Circuit by stating that the court wrongfully concluded that "*subornation* of perjury by trial counsel do[es] not constitute 'fraud upon the court.'" [emphasis added]. *Subornation* of perjury by ESM's attorney was never alleged in Peat Marwick's Amended Proof of Claim; nor was *subornation* of perjury addressed by the Eleventh Circuit. The allegations against ESM's counsel include that he: (1) provided false financial statements; (2) vouched for the credibility and integrity of ESM's principals when he knew of the ESM fraud; and (3) ten-

dered per
these alleg
of suborna
defines sub
ing or ind
perjury]."
Only if ES
perjured t
of perjury
devoid of
role in the
be offered.
ment upon
basis for
Certiorari.

Additi
the Eleven
Court's de
Empire Co
are easily
In *Hazel-A*
rect partic
opposing p
The fraud
basis and
falsely pre
in the fiel
relied on t
His active
article, the
reliance up
led the Co

ringement and to the inescapable conclusion that "fraud on the court" had occurred.

The acts allegedly committed by ESM's counsel fall far short of the egregious conduct of the attorney in *Hazel-Atlas*. The Eleventh Circuit analyzed the alleged misconduct of ESM's counsel and correctly concluded that his actions did not constitute "fraud on the court." As the Eleventh Circuit determined, the allegations against ESM's counsel merely show that he may have known of potential defenses available to Peat Marwick, which he is under no duty to disclose. (Pet. App. p.7a). Failure to inform the opposing party of information helpful to his defense is not fraud upon the court that can be asserted to set aside judgment one year after its entry. See *Kerwit Medical Products, Inc. v. N. & H. Instruments, Inc.*, 616 F.2d 833, 577 (5th Cir. 1980).

Peat Marwick asserts that its ignorance of the ESM fraud had two separate effects on the trial, which allegedly undermined the integrity of the court proceedings. First, Peat Marwick complains that it could have impeached ESM's witnesses had the truth been known. Second, it argues that ESM could not have relied on Peat Marwick's audited financial statements when ESM's own financial statements reflected the same fraudulent and deceptive treatment of related-party transactions. When extended to its logical conclusion, the absurdity of this argument becomes clear, as the Eleventh Circuit apparently recognized. If one cannot be deceived by the actions of another when he has deceived another in the same manner, then a murderer could never be murdered. The illogic of this argument—which is essential to Peat Marwick's

claim—is inescapable. Peat
have the judgment entered
the money repaid because
which is wholly irrelevant
Peat Marwick. Peat Marv
that ESM defrauded many
the money paid to ESM in
tained against Peat Marwick

Peat Marwick is asking
negligent conduct simply
negligent conduct was defra
Circuit properly recognized
taining relief from judgment

CONC

For these reasons, the F
tiorari should be denied.

May 17, 1988

R
L
T
70
M
(
B

No. 85-1727

Supreme Court, U.S.

FILED

MAY 27 1988

JOSEPH E. SPANKO, JR.

CLERK

IN THE
Court of the United States

OCTOBER TERM, 1987

GEORGE MARWICK MAIN & Co.,
Petitioner,

v.

THOMAS TEW,
ATTORNEY FOR ESM GROUP, INC., *et al.*,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR THE PETITIONER

PHILIP A. LACOVARA
Counsel of Record
HUGHES HUBBARD & REED
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 626-6200

LO
VICTOR M. EARLE, III
CAHILL GORDON & REINDEL
MAIN & Co. 80 Pine Street
reet New York, New York 10005
York 10055 (212) 701-3000

Y, JR.
& DOWNS
Financial Center
Wynne Boulevard
33131-2395

TABLE

Cases

Gordon v. State, 1

National Surety Co.

(8th Cir. 1903)

Nix v. Whiteside, 4

Rule

Fed. R. Civ. P. 60 (b)

ITIES

	Page
Fla. 1958)	4
nk, 120 F. 593	
.....	2
986)	4
.....	
.....	<i>passim</i>

IN THE
Supreme Court of the United States

OCTOBER TERM, 198

No. 87-1727

PEAT MARWICK MAIN &

v.

THOMAS TEW,
RECEIVER FOR ESM GROUP, INC.

On Petition for a Writ of Certiorari
from the
United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR THE PETITIONER

The brief in opposition continues to argue that the Court has historically attended the first two clauses of Rule 60(b).

1. Respondent candidly concedes that there is a "conflict of deed" a conflict between the decision of the Eleventh Circuits (Br. in Opp. at 10) and the Supreme Court. Nevertheless, respondent urges the Court not to resolve the conflict in this case. The Eleventh Circuit

that
aving

“in-
l and
ndent
y, be-
y re-

intrinsic dichotomy.¹ The Eleventh Circuit's decision thus is still another example of the long history of manipulated results that have been handed down in the name of finality. (See discussion in Pet. at 8-11.) This case therefore, presents the conceded conflict over the test for the independent action to attack a tainted judgment.

2. Turning to the second branch of the Eleventh Circuit's opinion—in which it held that the conduct by ESM and its counsel in the suit against Peat Marwick did not constitute “fraud on the court” within the meaning of Rule 60(b)—respondent contends that “fraud upon the court” did not occur because Peat Marwick did not specifically allege *subornation* of perjury. Respondent does acknowledge, though, that the allegations against ESM's counsel included, among others, his *tendering* of perjured testimony (Br. in Opp. 3-4). Respondent omits that Peat Marwick alleged that ESM's counsel had acted “knowingly” in providing falsified material in discovery and in tendering perjured testimony (Pet. App. 28a). Thus, respondent is attempting to distinguish between “subornation” of perjury and knowingly tendering perjured testimony.

¹ The court also stated that, because the jury found Peat Marwick to have been negligent in its audit, it could not satisfy an additional element: having a good defense to the claim on which the judgment was rendered. As we have pointed out (Pet. at 11), however, Peat Marwick had specifically pleaded ESM's lack of reliance in the original proceeding (an essential element in an action for misrepresentation), and that the perjured testimony frustrated the defense. (See discussion in Pet. at 13, n.7.)

In addition, the court concluded that the finding in the majority opinion that Peat Marwick had been negligent in its audit disqualified it from satisfying the element of “absence of fault or negligence on the part of the defendant” (Pet. App. 5a). The nature of ESM's claim, however, obviously had nothing to do with the later diligence arguably necessary to pursue an independent action to vacate a judgment procured by fraud. (See discussion in Pet. at 11, n.5).

Suc
Florio
State,
It is
winni
civil
score
and t
is no
by P
rema
his o

Peat
late,
hors
perj
cour
of E
to th

O
app
157
sug
mon
jur
nic

3
tha
gui
is
neg
me

wick to ESM and to a murderer, arguing that ESM's misconduct does not establish that Peat Marwick itself acted properly in its audit. (Br. in Opp. at 6.) And, as we have pointed out, the Eleventh Circuit based part of its holding on Peat Marwick's negligent auditing.

This characterization begs the question. Peat Marwick is not seeking relief because ESM defrauded *others*. Rather, the issue is whether fraudulently concealing those facts during discovery and offering perjured testimony at the trial tainted the record on which the jury relied in finding *against* Peat Marwick. The jury might not have found against Peat Marwick if there had been no falsified evidence and perjured testimony.

Moreover, wholly apart from the question-begging implicit in this approach, it imposes an impossible burden on a party seeking relief under Rule 60(b). Under that line of reasoning, only a party who was successful in the original action would have standing to invoke the Rule, but by definition Rule 60(b) offers relief *only* to a party against whom a judgment—but a tainted judgment—has been rendered. That approach, of course, would satisfy the craving for finality, because there would be virtually no more claims for post-judgment relief. By granting review, this Court can make it clear that that is not what was intended in 1946 when Rule 60(b) was amended. At the same time, the Court can resolve the two important conflicts described in the petition.

The petition for a

LEONARD P. NOVELLO
General Counsel
PEAT MARWICK MAIN
New York, New York
JAMES W. BEASLEY, JR.
BEASLEY, OLLE & DO
Miami, Florida 33131

May 27, 1988

